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W. Wesley Pue

Allard School of Law at the University of British Columbia, pue@allard.ubc.ca

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Citation Details

W Wesley Pue, Book Review of *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler* by Peter H Russell (2005) 23:2 Windsor YB Access Just 423.

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PETER H. RUSSELL, *RECOGNIZING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM*

Forthcoming, *Windsor Review of Access to Justice* (2005:2)

Dr. W. Wesley Pue*

Peter Russell, widely known for his scholarship on constitutional matters, is one of Canada's pre-eminent political scientists. He has been an active participant in Canadian constitutional debates, a pioneering "law and society" scholar, a founding figure *and* early President of the Canadian Law and Society Association. His contributions to scholarly culture, to Canadian public discourse, and to academic publishing are legion.¹

His newest book takes us to another country on a distant continent and to a new series of issues. *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism*² is a remarkable work which canvasses the history of Aborigine-settler relations in Australia from first European contact to the early twenty-first century. Its focal point is the surprising High Court of Australia decision in *Mabo v. Queensland (No. 2)*³ in which an indigenous Australian sought to establish his legal ownership of family lands in the face of seemingly unshakeable Australian legal doctrine. The legal fiction by which the entire country was deemed to have been *terra nullius* at the time of its discovery by Europeans made Mr. Mabo's course challenging. Australian legal experts had long assumed that Australia's first peoples, unlike colonized indigenous peoples of Africa, Asia, or North America, could hold no "traditional" title to lands. Overturning fiction long fossilized into legal doctrine took some doing, and the book is dedicated "In memory of Eddie Koiki Maba, a shit disturber *par excellence*".

Russell's explanation as to how he turned from scholarship on "high" constitutionalism to work on the nitty-gritty of a particular British-based constitutional system is a salutary tale, part methodological explanation, part theoretical insight and part *mea culpa*:

* Nemetz Chair in Legal History & Professor of Law, Associate Dean, Graduate Studies & Research, Faculty of Law, University of British Columbia.

¹ Amongst his writings: *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (ed. with David M. O'Brien) (Charlottesville: University Press of Virginia, 2001); *Judicial Power and Canadian Democracy* (ed. with Paul Howe) (Montreal: McGill-Queen's University Press for the Institute for Research on Public Policy, 2001); *The Future of Social Democracy: Views of Leaders from Around the World* (ed.) (Toronto: University of Toronto Press, 1999); "Ratifying a Postreferendum Agreement on Quebec Sovereignty" (with Bruce Ryder) (Toronto: C.D. Howe Institute, 1997); *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (Toronto: University of Toronto Press, 1993); "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30 Osgoode Hall L.J. 1 (with F.L. Morton & Michael J. Withey); "Federal judicial appointments: an appraisal of the first Mulroney government's appointments" (with Jacob S. Ziegel) (n.p., 1989); *Federalism and the Charter: Leading Constitutional Decisions* (with Rainer Knopff & Ted Morton) (Ottawa: Carleton University Press, 1989); *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987); *Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1987); *Leading Constitutional Decisions: Cases on the British North America Act* (Ottawa: Carleton University Press, 1982); "Freedom and security: an analysis of the policy issues before the Commission of Inquiry" (Ottawa: Commission of Inquiry Concerning Certain Activities of the Royal Canadian Mounted Police, 1978); "The Supreme Court of Canada as a bilingual and bicultural institution" (Ottawa, Queen's Printer for The Royal Commission on Bilingualism and Biculturalism, 1969); "Constitutional Reform of the Canadian Judiciary" (Toronto: Canadian Law Teachers Association, 1968); *Nationalism in Canada* (foreword by Frank Underhill) (Toronto: McGraw-Hill, 1966).

² (Toronto: University of Toronto Press, 2005) ISBN 0-8020 3863-8, 470 pp. including appendix and index [*Recognizing Aboriginal Title*].

³ (1992), 175 C.L.R. 168 (H.C.A.) [*Mabo*].

As a decision on common law native title, the *Mabo* case did not, on its face, seem to be of constitutional significance. If I did not include it among the Australian constitutional developments I needed to examine, however, I would be perpetuating the narrow understanding of constitutional politics that had characterized my earlier work.⁴

But for the guidance of Jillian Evans, who maintained a press-clippings room at the Australian National University's Research School of Social Sciences, he might have missed the significance of *Mabo* – clearly the “big” story of Australian constitutionalism in these years – entirely. After more than three decades of research on the failure of “grandiose projects of constitutional renewal”, Russell came to perceive that

... the formal, written Constitution is only one of the components of a constitutional system. The other components are political practices and conventions – organic statutes that, even though they are not formally part of the “written” Constitution, define some of a country's governing institutions – and, finally but by no means least, judicial decisions interpreting and developing the Constitution. I had come to appreciate that it is through these various components of the constitutional system, including the occasional amendment of the formal Constitution, that constitutional systems adapt and evolve. Seen in this light, *Mabo* might well have constitutional significance.⁵

Indeed.

Mabo changed Australian constitutionalism, politics, and law profoundly. The interplay of law, politics, constitutionalism, and history presented in *Recognizing Aboriginal Title* is subtle, nuanced and thorough. Russell, in fact, presents five books in one. It includes an important historical interpretation of European colonialism's main streams of thought, apologetics and self-critiques, and also provides a first class historical account of the workings-out of imperialist ideology through colonial law and policy regulating relations with indigenous peoples in Australia, Canada, New Zealand and the United States, the four principle British settler-colonies. Third, the work provides an assessment of recent developments in International Law relating to indigenous peoples, including their human rights and sovereignty. Fourth, it offers an extended theoretical contribution through a critique of unreflective legal positivism combined with a clear sighted realism as to the limited potential of litigation to effect significant social change. This is, in part, a repudiation of the sort of popular “black letter” constitutionalism that informs “One Nation” ideology in Australia, Reform Party understandings of First Nations issues in Canada, and most mysteriously of all, Republican Party approaches to the U.S. Constitution grounded in ‘original intent’. Finally, of course, the book provides an account of the remarkable accomplishments of an individual who changed history: “Eddie Koiki Mabo, a Merian man of the Pladarim clan, pearler, long-time exile, cane-cutter, dock-worker, loving husband, father and grandfather, school founder, community activist, university groundsman, researcher and lecturer, champion of Indigenous culture, and a courageous, indefatigable, but mortal litigator ... an Australian hero.”⁶

The book is exhaustively researched presenting a remarkable synthesis and interpretation of diverse literatures. Its sweep makes it indispensable for those researching constitutionalism or aboriginal issues in *any* of Canada, the United States, New Zealand or Australia, as well as for anyone with historical interests in either British Imperial law or international law relating to colonialism. The

⁴ *Recognizing Aboriginal Title*, *supra* note 2 at 5.

⁵ *Ibid.* at 6.

⁶ *Ibid.* at 312.

five streams are woven into a tightly integrated, beautifully written, engaging, carefully conceived and persuasive whole, making it a “must-read” well beyond narrow circles of subject-matter specialists.

These seemingly diverse spatial, political, and intellectual threads come together in the person of Eddie Mabo and his struggle to prove title to land inherited under the laws of his peoples. Mabo was raised in a traditional community on the Island of Mer (also known as Murray Island), one of the Torres Strait Islands. The islands lie north of Australia, off Queensland’s Cape York, in waters separating Papua New Guinea from mainland Australia.⁷ It was only as an adult who had already established himself as an aboriginal activist that Mabo discovered the full extent of his dispossession under Australian law. Russell describes a meeting at James Cook University “some time around 1974” between historians Noel Loos and Henry Reynolds and Mabo, then a groundskeeper employed as a research assistant:

Mabo talked about land that still belonged to him on Murray Island and his determination to return to it. At this point, Loos and Reynolds exchanged glances and tried to explain gently to Mabo that, because the land belonged to the Crown, he was probably mistaken about his land ownership. To demonstrate the point, they took down an old Queensland map and showed him that his island, like all the Torres Strait Islands, was marked “Aboriginal Reserve”. Loos recalls that Mabo exploded at this explanation. “I’d like to see someone take my land away from me,” he screamed at them.⁸

One might have thought that Mabo’s attempt to establish the legal entitlement of Meriam people to ownership of their land unproblematic. Their mode of land use and ownership was easily cognizable to European eyes. Under their own customary mechanisms of recognition and transmission established under “Malo Law” property was divided into “garden plots and fish traps”.⁹ Even the forms and processes of Malo Law were easily recognizable as such by Europeans, for they produced a sort of “Oral Register of Title” not entirely unlike medieval customary landholdings in the United Kingdom.¹⁰ Moreover, Mabo’s claim was of a sort that had *in fact* been formally recognized during the history of colonial governance in the region. The entire Malo system had been incorporated in Queensland law through the work of the state’s “Murray Island Native Court”, which had produced a remarkable record of dispute resolution seemingly confirming the existence of “native” title in the Islands. The Court Book recorded “many cases over a period of eighty years in which the Island Court, authorized by Queensland law, settled disputes according to the traditional system of land tenure”.¹¹

Nonetheless, a peculiar Australian alchemy of colonial fantasy suffused legal doctrine to such an extent that it was to take fully 10 years to establish the principle that there *might* be such a thing as “native title” on the island. Australia’s founding ideology, grounded in a strong version of the *terra nullius* mythology, gave way only reluctantly to observable fact, past state practice, and the internal logic of British imperial law. Mabo’s stubborn insistence that Australian courts should look to lived experience, history, and past state practices in order to correct an abstract, erroneous, but firmly entrenched legal doctrine forms the heart of this book. Russell traces out the various legal and political encounters along the way, as well as the follow-up to the High Court of Australia’s decision (particularly in the *Wik* case¹²) and the political whirl-wind it brought forth.

⁷ *Ibid.* at 20-21 (Maps).

⁸ *Ibid.* at 28-29.

⁹ *Ibid.* at 204.

¹⁰ Mabo told a Townsville Conference in 1981 that Islander ownership of land was similar to that of the English, Welsh, and Scots: *ibid.* at 194.

¹¹ *Ibid.* at 204.

¹² *Wik Peoples v. Queensland* (1996), 187 C.L.R. 1 (H.C.A.).

The story is, in part, an edifying tale of heroic, individual, human agency. Eddie Mabo appears as the principle hero, but there are others. Historian Henry Reynolds, surely the most important socio-legal scholar to emerge from Australia during the twentieth century, looms large, too. So do others. The remarkable barrister, Barbara Hocking is credited as “the intellectual architect of the *Mabo* case”.¹³ “Much against the advice of her supervisor,” Hocking had completed a master’s thesis “on the recognition of original native title by the colonial powers of Europe”.¹⁴ This work became central to the legal arguments that eventually prevailed. The book is not just about heroic figures, however. It is also a story about remarkable collective action by less celebrated Aboriginal peoples, of positive developments in the courts and of developments in the international arena. Undoubtedly, a form of justice was worked in *Mabo*. Beneficial results flowed for Australia’s indigenous peoples. Legal action, at least in the right “conjuncture”, worked for the good.

Peter Russell, however, does not naïvely leave things here. “Judges,” he points out, “have no power to enforce their decisions. However revolutionary a judicial decision may be on paper, the changes it effects in the real world depend on how the political system as a whole responds to it.”¹⁵ The larger question of the practical outcomes of this heroic tale takes us into Australia’s collective psyche, epitomized in the personality of the country’s tremendously popular Prime Minister, John Howard. Howard, it turns out, announced his intentions early in a speech which “virtually amounted to a declaration of war on Indigenous peoples’ rights.”¹⁶ Though remarkably similar to positions advanced by Canadian Prime Minister Pierre Trudeau and Cabinet Minister Jean Chretien in the 1960s, Prime Minister Howard’s understandings find little contemporary resonance in international law, historiography, or the common law of the former British Empire. The inappropriateness of gauging aboriginal peoples’ entitlements only on the scales of “citizenship” or “minority rights” was dramatically revealed to a mass Canadian readership over thirty-five years ago through the remarkable work of the Cree leader and scholar Harold Cardinal. Whatever its problems, Canadian public policy has never returned to those starting points.¹⁷ The possibility of starting from a position that recognizes the “firstness” of First Peoples remains mysterious to many Australians, including their governing party.

In other respects, however, the two countries apparently move in tandem. Russell’s assertion that “Australian judges seem to be whittling native title down to ‘a bundle of rights’ – rights to carry on specific traditional activities – rather than a controlling interest in their traditional country” applies *holus bolus* in Canada, as demonstrated in *R. v. Joshua Bernard*,¹⁸ denying an aboriginal entitlement to logging as an incident of Mi’kmaq treaty rights.

Aboriginal politics in Australia, like the kindred “history wars”¹⁹ are fought with a peculiar intensity, ferocity, and at a pace seldom seen in Canada. Change can come at stunning speed, especially if measured on the glacial scale of movement to which Canadian observers of aboriginal policy have become accustomed. To take but one example, the Aboriginal and Torres Straits Islanders Commission, which Peter Russell describes in hopeful terms throughout the book,²⁰ was abolished between the time of writing and publication.²¹ It is impossible to be fully up to date.

¹³ *Recognizing Aboriginal Title*, *supra* note 2 at 195.

¹⁴ *Ibid.* at 194. See Barbara Hocking, “Does Aboriginal Law Now Run in Australia?” (1979) 10 Fed. L. Rev. 161.

¹⁵ *Recognizing Aboriginal Title*, *ibid.* at 5.

¹⁶ *Ibid.* at 326.

¹⁷ See Harold Cardinal, *The Unjust Society* (Edmonton: M.G. Hurtig, 1969), republished (Vancouver: Douglas & McIntyre, 1999).

¹⁸ *Her Majesty the Queen v. Joshua Bernard (N.B.)*, 2005 SCC 43, coram: McLachlin C.J.C. and Major, Bastarache, LeBel, Fish, Abella and Charron JJ.A.

¹⁹ See e.g. Stuart Macintyre & Anna Clark, *The History Wars* (Carlton, Vic.: Melbourne University Press, 2003).

²⁰ *Recognizing Aboriginal Title*, *supra* note 2 at 225.

²¹ See e.g. the report in the *Sydney Morning Herald* on March 16, 2005 at: <http://www.smh.com.au/news/National/ATSIC-abolished-after-bill-passes-Parliament/2005/03/16/1110913660843.html>.

Where the future will lead remains unclear: as the book clearly illustrates, the interplay of law and politics is complex, multi-leveled and unpredictable.